IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

NORANDA ALUMINUM HOLDING COMPANY,	)	
Plaintiff,	)	
v.	)	C.A. No. N17C-01-152 WCC CCLD
XL INSURANCE AMERICA, INC., ET AL.,	)	
Defendants.	)	

Submitted: October 1, 2018
Decided: March 21, 2019

Plaintiff's Motion for Partial Summary Judgment – GRANTED IN PART, DENIED IN PART

Defendants' Motion for Partial Summary Judgment – Sale of the New Madrid Facility – DENIED

Defendants' Motion for Partial Summary Judgment – Non-Continuing Payroll – DENIED

Defendants' Motion for Partial Summary Judgment – "Idle Periods" Exclusion – DENIED

MEMORANDUM OPINION

David J. Baldwin, Esquire; Carla M. Jones, Esquire; Potter Anderson & Corroon LLP, 1313 North Market Street, Sixth Floor, Wilmington, DE 19801. Attorneys for Plaintiff.

David B. Goodwin, Esquire (Argued); Christine S. Haskett, Esquire (Argued); Nicholas M. Lampros, Esquire; Rebecca A. Jacobs, Esquire; Covington & Burling LLP, One Front Street, San Francisco, CA 94111. Attorneys for Plaintiff.

John L. Reed, Esquire; Ethan H. Townsend, Esquire; Harrison S. Carpenter, Esquire; DLA Piper LLP, 1201 North Market Street, Suite 2100, Wilmington, DE 19801. Attorneys for Defendants.

John N. Love, Esquire; Jonathan D. Mutch, Esquire (Argued); Matthew P. Cardosi, Esquire; Robins Kaplan LLP, 800 Boylston Street, Suite 2500, Boston, MA 02199. Attorneys for Defendants.

CARPENTER, J.

Before the Court is Plaintiff Noranda Aluminum Holding Company's ("Noranda" or "Plaintiff") Motion for Partial Summary Judgment, as well as the Defendant Insurers' ("Insurers" or "Defendants") Motions for Partial Summary Judgment on Sale of the New Madrid Facility, Non-Continuing Payroll, and Idle Periods. For the reasons set forth in this Opinion, Plaintiff's Motion for Partial Summary Judgment is granted in part and denied in part. Defendants' Motions for Partial Summary Judgment are denied.

I. FACTUAL & PROCEDURAL BACKGROUND

This litigation stems from property insurance policies that Defendants issued to Plaintiff for the period of May 18, 2015 to May 18, 2016.[1] The policies at issue "provide coverage to Noranda for physical damage and time element loss resulting from two accidents at a Noranda aluminum production facility located in New Madrid, Missouri."[2] Plaintiff contends that the Insurers "breached their insurance contracts with regard to Noranda's time element losses resulting from the accidents … with the Insurers offering to pay only a small fraction of Noranda's actual losses."[3] The Defendants argue that they have not breached the policies because various provisions in the insurance contracts preclude coverage for Noranda's time element claims.[4]

---

[1] Compl. ¶ 1.
[2] *Id.*
[3] *Id.*
[4] Defs.' Opp'n. Br. Mot. for Partial Summ. J. at 1.

A. Noranda's Insurance Coverage Program

There is no dispute that the policies Defendants issued to Plaintiff included coverage for property damage and resulting time element losses at its aluminum plant in New Madrid, Missouri ("New Madrid Plant").[5] More specifically, the "Time Element" provision gave Noranda the option to make a claim for time element loss based on its gross earnings.[6] It further provides that:

> The recoverable GROSS EARNINGS loss is the Actual Loss Sustained by the Insured of the following during the PERIOD OF LIABILITY:
>
> a) Gross Earnings;
>
> b) less all charges and expenses that do not necessarily continue during the interruption of production or suspension of business operations or services;
>
> c) less ordinary payroll; and
>
> d) plus all other earnings derived from the operation of the business.
>
> e) Ordinary Payroll, including taxes and charges dependent on the payment of wages:
>
> (i) for a period of time of not more than the number of consecutive days shown in the LIMITS OF LIABILITY clause of the DECLARATIONS section immediately following the interruption

[5] Compl. ¶ 21; Answ. ¶ 21.
[6] *See* Compl., Ex. B [hereinafter FM Policy] at Time Element, § 2.A (Page 45).

of production or suspension of business operations or services, and

(ii) only to the extent such payroll continues following the loss and would have been earned had no such interruption happened. [7]

The "PERIOD OF LIABILITY" for building and equipment is defined as:

a) starting from the time of physical loss or damage of the type insured; and

b) ending when with due diligence and dispatch the building and equipment could be:

(i) repaired or replaced; and

(ii) made ready for operations,

under the same or equivalent physical and operating conditions that existed prior to the damage.

c) not to be limited by the expiration of this Policy.[8]

B. Accidents at the New Madrid Plant

On August 4, 2015, a casthouse explosion occurred at the New Madrid Plant, "causing extensive property damage to the facility and equipment, necessitating significant repair costs, and resulting in lost revenue due to business interruption while production was halted by the explosion and the damage it caused."[9] After the explosion, Noranda tendered a claim to Insurers for the property damage and time

[7] *Id.* at Time Element, § 2.B (Pages 45-46).
[8] *Id.* at Time Element, § 3.A (Pages 51-52).
[9] Compl. ¶ 35.

element losses purportedly caused by the accident.[10] The parties have "resolved the property damage component of the [casthouse explosion] claim, but the Insurers have refused to pay most of Noranda's time element losses."[11]

Several months later, on January 7, 2016, two of the three potlines at the New Madrid Plant froze due to a switchgear failure, which also caused "significant property damage" and "a sizeable time element loss."[12] Plaintiff subsequently tendered another claim to Defendants for the potline freeze.[13] Again, Noranda alleges that Insurers paid the property damage component of the claim, but have refused to make any payment for its time element losses relating to the potline freeze.[14]

C. Noranda Files for Bankruptcy and Sells New Madrid Plant

On February 8, 2016, Noranda filed a petition for Chapter 11 bankruptcy.[15] Approximately one month later, on March 12, 2016, Plaintiff idled the New Madrid Plant to comply with the terms of its debtor-in-possession financing.[16] In November 2016, Noranda ultimately sold the New Madrid Plant "as part of a bankruptcy restructuring that resulted in the liquidation of certain … assets."[17]

---

[10] *Id.* ¶ 36.
[11] *Id.*
[12] *Id.* ¶ 37.
[13] *Id.* ¶ 38.
[14] *Id.*
[15] Compl. ¶ 40.
[16] Pl.'s Opening Br. Mot. for Partial Summ. J. at 7.
[17] Compl. ¶ 40.

D. The Instant Litigation

On January 6, 2017, Plaintiff filed its Complaint against the Defendant Insurers, alleging that they "breached the Policies by failing to make the required payments for Noranda's time element losses."[18] On August 3, 2018, Plaintiff filed a Motion for Partial Summary Judgment on a variety of defenses to coverage raised by the Insurers, including the idle periods exclusion and sale of the New Madrid Facility. Defendants also filed their own Motions for Partial Summary Judgment on the idle periods exclusion, sale of the New Madrid Facility, and non-continuing payroll. During oral argument on October 1, 2018, the Court denied Plaintiff and Defendants' Cross-Motions for Partial Summary Judgment as to the idle periods exclusion, and in addition to what was articulated in open court, the reasoning for that decision is included in this Opinion. This is the Court's decision on the remaining Motions for Partial Summary Judgment.

II. STANDARD OF REVIEW

In reviewing a motion for summary judgment pursuant to Superior Court Civil Rule 56, the Court must determine whether any genuine issues of material fact exist.[19] The moving party bears the burden of showing that there are no genuine issues of material fact, such that he or she is entitled to judgment as a matter of law.[20]

---

[18] *Id.* ¶ 42.
[19] Super. Ct. Civ. R. 56(c); *see also Wilm. Tru. Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).
[20] *See Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

In reviewing a motion for summary judgment, the Court must view all factual inferences in a light most favorable to the non-moving party.[21] Where it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate, summary judgment will not be granted.[22] Additionally, "the standard for summary judgment 'is not altered'" with cross-motions for summary judgment.[23]

III. DISCUSSION

A. Choice of Law Dispute

Because the insurance contracts do not contain a choice of law provision, the parties disagree on which state's law should govern the Court's decision on the Motions. Noranda argues that Delaware law should be applied because "no difference exists between Delaware law and that of Missouri (where the New Madrid plant is located) or … the law of most other states on the issues presented …"[24] The Defendant Insurers contend that a choice of law analysis warrants the application of New York, Missouri, or Tennessee law.[25]

When faced with a choice of law question, Delaware courts follow the "most significant relationship" test.[26] However, when the law from each of the competing

---

[21] *See Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[22] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. Ct. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).
[23] *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. Ct. 2001) (citing *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997)).
[24] Pl.'s Opening Br. Mot. for Partial Summ. J. at 11.
[25] *See* Defs.' Opp'n. Br. Mot. for Partial Summ. J. at 18-20.
[26] *Lagrone v. American Mortell Corp.*, 2008 WL 4152677, at *5 (Del. Super. Ct. 2008).

jurisdictions would lead to the same result, a false conflict exists and a choice of law analysis should be avoided.[27] The Court's decision is largely based on rules of contract interpretation, which do not differ among the competing jurisdictions. In Delaware, "'[c]lear and unambiguous language in an insurance contract should be given its ordinary and usual meaning.'"[28] The parties' disagreement over proper construction does not render a contract ambiguous.[29] Instead, an insurance contract is ambiguous when it may reasonably be given multiple, different interpretations.[30] If an ambiguity exists, the Court "will apply the doctrine of *contra proferentem* and construe ambiguous terms and provisions against the drafting party."[31] Finally, the insurance contract should be read as a whole, giving each provision and term effect, so as not to render any part of the policy mere surplusage.[32]

These same principles of contract interpretation are applied to insurance contracts under New York, Missouri, and Tennessee law.[33] Furthermore, there is no other state that has a more significant relationship to this conflict than that of Delaware, where the parties are incorporated. The plant is in Missouri; Plaintiff is

---

[27] *Motors Liquidation Co., Dip Lenders Tru. v. Allianz Ins. Co.*, 2013 WL 7095859, at *2 (Del. Super. Ct. 2013).
[28] *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 69 (Del. 2011).
[29] *Id.*
[30] *Id.*
[31] *Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 397 (Del. 2010).
[32] *Id.* at 396-97.
[33] *See Universal American Corp. v. National Union Fire Ins. Co.*, 37 N.E.3d 78, 80-81 (N.Y. 2015); *Clark v. Sputniks, LLC*, 368 S.W.3d 431, 441 (Tenn. 2012); *Allen v. Continental Western Ins. Co.*, 436 S.W.3d 548, 553-54 (Mo. 2014).

headquartered in Tennessee; the policy was issued from Canada; the policy was sent to New York and the premiums were paid in Tennessee. Accordingly, the Court will apply Delaware law in its decision.

B. Motions for Partial Summary Judgment

While both parties have filed Motions for Partial Summary Judgment, there are three primary issues that require the Court's attention at this junction of the litigation. They relate to (1) the sale of the New Madrid facility, (2) the effect of payroll no longer being disbursed, and (3) the "idle periods" exclusion to time element coverage.

1. Sale of the Plant

Defendants first argue that Noranda is barred from recovering any time element losses that allegedly occurred after its sale of the New Madrid Plant in November 2016.[34] The Insurers claim that after Plaintiff sold the facility, it could no longer demonstrate a loss of sales from the interruption in production, as required by the insurance policies.[35] Furthermore, Defendants contend that Noranda no longer had an insurable interest in the facility's earnings after selling the New Madrid Plant.[36]

---

[34] *See* Defs.' Opening Br. Mot. for Partial Summ. J. Sale of New Madrid Facility at 16-19.
[35] *See id.*
[36] *See id.* at 19-29.

In response, Plaintiff argues that "[n]othing in [the policy] language states, or even implies, that the Period of Liability terminates if, after an accident and the insurer's denial of coverage, the insured sells the damaged facility."[37] Noranda also claims it was only required to have an insurable interest at the time of the two physical accidents for which it seeks time element coverage – the casthouse explosion on August 4, 2015, and the potline freeze on January 7, 2016.[38]

In reviewing the insurance contract, the Court finds there is nothing to suggest Noranda's sale of the New Madrid Plant would terminate the period of liability for which it is allegedly entitled to receive time element coverage. The contract language defining "period of liability" does not impose any limitations that would prompt it to end before the time "when with due diligence and dispatch the building and equipment could be repaired or replaced and made ready for operations, under the same or equivalent physical and operating conditions that existed prior to the damage."[39] Instead, it only states that the "period of liability" is "not to be limited by the expiration of this Policy."[40] The Court declines to read any limiting or restricting provisions not bargained for into the policy now by holding that the period of liability is cut short because Noranda sold the New Madrid Plant in November 2016.

---

[37] Pl.'s Opp'n. Br. Mot. for Partial Summ. J. at 11.
[38] *See id.* at 7-10.
[39] FM Policy at Time Element, § 3.A (Pages 51-52).
[40] *Id.* (Page 52).

It appears fundamental to this unique area of insurance that it is not unusual that decisions not to rebuild are made for a myriad of reasons after a catastrophic incident, which may also ultimately lead to an abandonment or sale of the property. There is also no dispute that the decision not to rebuild would not terminate coverage since it would in effect remove any benefit to Plaintiff for the premiums accepted by the Insurers. Instead, coverage is determined by a hypothetical period of how long a reasonable entity would have taken to rebuild if they had decided to do so. This fairly places a limit on coverage, but also allows the insured to obtain the benefit for which it paid. The Court finds this remains true regardless of whether the insured decides to sell the property or is forced to do so. Unless otherwise contractually limited, to rule differently would frustrate the coverage paid for by Plaintiff.

Recognizing that there is nothing in the policy that would specifically terminate coverage if the facility was sold, Defendants argue that Plaintiff is unable to establish a loss of sales, as required under the contract. More specifically, the policy states there is time element recovery based on gross earnings only "to the extent that the Insured is … able to demonstrate a loss of sales for the operations, services or production prevented."[41] Regardless of whether Plaintiff owns or sells the facility, it should still be allowed to recover for the hypothetical time frame. The Court finds no distinction between owning but not rebuilding or not rebuilding and

[41] *Id.* at Time Element, § 2.B (Page 47).

selling. There are no sales or earnings in either case. Plaintiff paid for the hypothetical time it takes to rebuild and there is no dispute that this is the appropriate standard used in these types of contracts. If the Court accepted Defendants' position, then Plaintiff would lose this benefit for which it paid premiums to protect.

The Court also finds there is nothing in the policy that requires Noranda to maintain an insurable interest in the New Madrid Facility throughout the entire period of liability it is claiming time element coverage, however long that might be. More specifically, the contract states that the "Policy insures TIME ELEMENT loss … directly resulting from physical loss or damage of the type insured … during the Periods of Liability described in this section."[42] As discussed above, the period of liability is measured "starting from the time of physical loss or damage of the type insured and ending when with due diligence and dispatch the building and equipment could be repaired or replaced and made ready for operations, under the same or equivalent physical and operating conditions that existed prior to the damage."[43] There is simply nothing in those two clauses requiring Plaintiff to have an insurable interest in the facility at the time the period of liability ends, and again, the Court declines to read such a requirement into the policy now. The contract language itself supports Noranda's position that it was only required to have an insurable interest in the New Madrid Plant when the period of liability begins at "the time of the physical

---

[42] *Id.* at Time Element, § 1.A (Page 44).
[43] *Id.* at Time Element, § 3.A (Pages 51-52).

loss or damage of the type insured."[44] If Defendants wanted to prevent recovery upon the sale of the property, they could have easily made that a requirement under the policy. It would have been simple to do so, and the Court will not now do what the Insurers in hindsight wish they had done.

Therefore, Plaintiff's Motion for Partial Summary Judgment on the Insurers' Sale of the Plant Defense is granted. Consequently, Defendants' Cross-Motion for Partial Summary Judgment is denied.

2. Non-Continuing Payroll

From the Court's perspective, there is a disconnect between what was argued in the briefs filed on this issue and what was presented to the Court during oral argument. Therefore, as a starting point, the Court will set forth its understanding of the contractual process articulated in the policy.

The policy provision at issue states:

> The recoverable GROSS EARNINGS loss is the Actual Loss Sustained by the Insured of the following during the PERIOD OF LIABILITY:
>
> a) Gross Earnings;
>
> b) less all charges and expenses that do not necessarily continue during the interruption of production or suspension of business operations or services;
>
> c) less ordinary payroll; and

[44] *Id.* (Page 52).

d) plus all other earnings derived from the operation of the business.

e) Ordinary Payroll, including taxes and charges dependent on the payment of wages:

(iii) for a period of time of not more than the number of consecutive days shown in the LIMITS OF LIABILITY clause of the DECLARATIONS section immediately following the interruption of production or suspension of business operations or services, and

(iv) only to the extent such payroll continues following the loss and would have been earned had no such interruption happened. [45]

Under this provision, we start by determining "Gross Earnings," as used in subsection "a" and which the parties generally seem to agree on how they are calculated. Once the "Gross Earnings" amount has been calculated, then:

- Subtract all charges and expenses that do not necessarily continue during the interruption of production or suspension of business operations;
- Subtract ordinary payroll;
- Add all other earnings derived from the operation of the business; and
- Add Ordinary Payroll only to the extent it continues during the loss.

[45] FM Policy at Time Element, § 2.B (Pages 45-46).

After oral argument, the Court understands that under this formula, if you had 100 workers handling the potlines and 75 were let go, but the company believed 25 employees needed to be retained and thus were paid during the time production was disrupted, they would be added back into the payroll set forth in subsection "e." However, there appears to be a disagreement between the parties as to what subsection "e" actually means. Plaintiff argues that while the same "ordinary payroll" language is used in both subsection "e" and subsection "c," the subsection "e" term is capitalized and thus has a different meaning, which relates to "extra" coverage Plaintiff could have purchased but ultimately did not. In the absolutely absurd world of insurance policies, which generally are unable to be read with any common sense, the capitalization here may actually mean something other than its plain words. Fortunately for the Court, it does not appear in this litigation to be significant to the Gross Earnings calculation, as Plaintiff is not seeking additional payroll under subsection "e." As such, there is nothing to add back in to the formula under subsection "e."

With this caveat, the Court believes the parties are in basic agreement. The dispute here is about who or what is included in each category. The issue is complicated by the fact that, at some point after the destruction of potlines one and two, the company decided to or was forced to close the entire facility. As such, the Insurers now want to subtract the payroll for employees who worked on potline three and were let go when the facility closed, even though they agree the loss of gross earnings only relates to potlines one and two. The Court agrees with Noranda that this is not only inconsistent with the policy but also fundamentally unfair. The simple answer here is that only the earnings that would have been attributable to potlines one and two and the payroll that was saved in the operation of these two potlines should be used in the gross earnings calculation.

Additionally, because the policy does not cover any time element losses attributable to bankruptcy, it follows that any "ordinary payroll" saved by Noranda as a result of its bankruptcy proceedings should not factor into the gross earnings loss calculation. Only "ordinary payroll" saved on the two potlines affected by the physical property damage that the policy covers should be deducted from "Gross Earnings," as used in subparagraph "a." Any "ordinary payroll" saved on the third potline that was idled due to Noranda's bankruptcy is irrelevant to the calculation of recoverable gross earnings. Therefore, Defendants' Motion for Partial Summary Judgment on Non-Continuing Payroll is denied.

3. Idle Periods Exclusion

Under the policy, the "period of liability" begins to run at the time the physical damage to the facility occurs and continues until, with due diligence, the damage has been repaired or replaced and the building or equipment is ready to operate as it was prior to the damage occurring. The policy, however, has an exclusion provision which states that coverage does not exist for "[a]ny loss during any idle period, including but not limited to when production, operation, service or delivery or receipt of goods would cease, or would not have taken place or would have been prevented due to any other reason other than physical loss or damage insured under this Policy."[46] Since the facility closed on March 12, 2016, when Plaintiffs were in the midst of bankruptcy, and Defendants argue that the closure was caused by the decline in aluminum prices and Noranda's own unsustainable financial condition, not the damage to the casthouse and potlines, coverage at most should cease as of March 2016. While acknowledging its financial difficulties and subsequent bankruptcy filing, Plaintiff disputes that the closure would have occurred even if the two physical damage events had not happened.

The Court finds there is a genuine factual dispute between the parties as to what actually caused Noranda's interruption in operation and the resulting losses for which it is seeking recovery. As such, summary judgment is inappropriate and it is for the jury, not the Court, to decide what it believes caused Noranda's alleged losses and subsequently whether the Insurers' idle periods exclusion prevents recovery under the policy. Under the facts submitted to the Court, it cannot conclude that no rational trier of fact could find in Plaintiff's favor. Defendants will have their opportunity to convince the jury of the merits of this position, but it does not rise to

---

[46] *Id.* at Time Element, § 4.A (Page 54).

the level that justifies summary judgment. Therefore, Defendants' Motion for Partial Summary Judgment regarding the idle periods exclusion is hereby denied.

4. Plaintiff's Remaining Summary Judgment Motions

Plaintiff has asserted several summary judgment motion requests on various other affirmative defenses raised by Defendants in their answer to the Complaint. Some of the concerns set forth in these Motions have been addressed and decided in the preceding sections of this Opinion. However, to the extent some remain, the Court believes they are ones that should await trial in this matter. These issues were not pressed by counsel at oral argument and it is unclear to what extent they will be asserted at trial now that discovery has taken place. However, as a matter of caution, if Defendants would like to pursue any affirmative defense that has not been addressed in this Opinion and was the subject of the Plaintiff's Motion, they may not make mention of it to the jury in opening statements, unless they first proffer to the Court what they intend to introduce and the Court makes a determination that there is a reasonable basis to allow its presentation in openings. Therefore, to the extent there are remaining matters for which partial summary judgment was requested, those motions are denied without prejudice to raise at trial.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment is **GRANTED IN PART AND DENIED IN PART**. Defendants' Motion for Partial Summary Judgment - Sale of the New Madrid Facility is **DENIED**. Defendants' Motion for Partial Summary Judgment – Non-Continuing Payroll is **DENIED**. Defendants' Motion for Partial Summary Judgment – "Idle Periods" Exclusion i**s** **DENIED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.